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No. 09-197

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KIMCO OF EVANSVILLE, INC.,
N/K/A KCH ACQUISITION, INC.,
THE FRANKLIN LIFE INSURANCE COMPANY,
AND
VANDERBURGH COUNTY, INDIANA,

Petitioners,

V.

STATE OF INDIANA,

Respondent.

On Petition for a Writ of Certiorari to the
Indiana Supreme Court

BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS AND NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST AND CONSENT OF PARTIES

The International Council of Shopping Centers ("ICSC") is the global trade association of the shopping center industry. Its 60,000 members in the U.S., Canada and more than 80 other countries include shopping center owners, developers, managers, marketing specialists, investors, lenders, retailers and other professionals as well as academics and public officials. The ICSC was founded in 1957.

The National Association of Real Estate Investment Trusts ("NAREIT") is the worldwide representative voice for real estate investment trusts ("REITs") and publicly traded real estate companies with an interest in United States real estate and capital markets. NAREIT's members are REITs and other businesses throughout the world that own, operate, and finance income-producing real estate, as well as those firms and individuals who advise, study, and service those businesses.

The issues raised in the instant action are of significant importance to the members of ICSC and NAREIT. As set forth below, the law has developed in states such as Indiana that deny property owners true "just compensation" as guaranteed by the Fifth Amendment of the United States Constitution. Specifically, these states prohibit including in the compensation paid to condemnees, the diminution of value of condemned property caused by changes in access to the condemned property. These damages are widespread due to the number of highway improvement projects throughout the country. This

issue is critical to the members of ICSC and NAREIT because they are regularly subjected to these condemnations and are denied true just compensation.

The parties to this action have consented to the filing of this amicus brief.

QUESTIONS PRESENTED

Whether, in a de jure partial taking, the just compensation paid to a condemnee may include the diminution in value of the remainder – i.e., the part of the property not taken – caused by a change in access.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment to the United States Constitution, which provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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REASONS FOR GRANTING THE PETITION/ SUMMARY OF ARGUMENT

Few issues have received as much attention by the courts and by the public as those relating to the government's use of its power of eminent domain. Indeed, recognizing the importance of these issues, this Court has decided at least four eminent domain cases since 2005 and is considering at least one case on its current docket.

However, the specific issue of this case has never been addressed by this Court. Perhaps the largest category of condemnations occurs as part of highway improvement and other roadway projects. These condemnations often change or eliminate an access point that is a valuable element of the condemned property. Partial takings[1] that impair access to condemned property occur regularly.

These takings can significantly impact the value of the "remainder" – i.e., the property that is not taken – and, just like other elements of value, should be considered when determining the amount of just compensation owed to the condemnee. For example, the Appraisal Institute specifically directs its appraisers to consider a property's access and potential changes in access when conducting an appraisal.

However, most states do not generally compensate condemnees for the decrease in value attributable to changes in access ("Access Compensation"). For example, most states will not permit just compensation to include Access Compensation – even if there has been a diminution

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[1] Condemnations that only take part of the condemnee's property are known as "partial takings."

of value – if the remainder has "reasonable access." In the instant case, the Supreme Court of Indiana stated that the jury award was "sustainable only if [the Condemnee's] impaired access is compensable." *See* Pet. A-10. That Court held that, even though the condemnee demonstrated – and the jury found – that the change in the access decreased the value of the remainder, it was not compensable. As set forth below, these rulings deny condemnees true "just compensation."

The exclusion of elements of value such as Access Compensation violates the Fifth Amendment's "just compensation" mandate. The Fifth Amendment to the Constitution of the United States requires that condemnees must be paid "just compensation" for the taking of their property. The Just Compensation Clause requires, at a minimum, that a condemnee "must be made whole" and must "be put in as good a position pecuniarily as if his property had not been taken." *Olson v. United States*, 292 U.S. 246, 255 (1934). The compensation "must be a full and perfect equivalent for the property taken" and must include "all elements of value that inhere in the property . . . ." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893), *Olson*, 292 U.S. at 256. In calculating the amount of just compensation, a condemnee is entitled to the fair market value of its property at the time of the taking which is "to be ascertained from 'what a willing buyer would pay in cash to a willing seller.'" *Almota Farmers Elevator & Warehouse Co. v. U. S.*, 409 U.S. 470, 473-474 (1973). In partial takings cases, the just compensation must include the damage to the

"remainder." *United States v. Grizzard*, 219 U.S. 180, 184 (1911).

Each of these requirements is violated if the compensation paid to a condemnee does not include damages to the remainder caused by a change of access. Once it is established in a de jure condemnation action – as was the case in the instant action – that a change of access caused a decrease in value to the remainder, the condemnee necessarily will not be "made whole" or "be put in as good a position pecuniarily as if his property had not been taken" unless it is compensated for that decrease. Compensation that does not reflect this decrease necessarily will not "be a full and perfect equivalent for the property taken."

In addition, it is beyond debate that access can be an "element of value" of many properties. Accordingly, in such cases, condemnees must be paid for the decrease in that "element of value." *Olson*, 292 U.S. at 256. It is also beyond debate that "a willing buyer and seller" would consider a property's access in determining the sale price. Accordingly, any decrease in value to the remainder caused by a change in access must be included in the just compensation payment. *Almota Farmers Elevator & Warehouse Co.*, 409 U.S. at 473-474, *Grizzard*, 219 U.S. at 184.

This Court has not addressed this specific issue which impacts property owners every day. Commentators discussing this issue agree that it has created confusion and often leads to the denial of just compensation. As one commentator explained in analyzing this specific issue, "Even within the same jurisdiction, there may be inconsistencies and gray areas. From state to state, inconsistency is the

norm." McKirdy, *Compensation for Impairment of Rights of Access*, 1988 Institute on Planning, Zoning and Eminent Domain § 13.03 (Sw. Legal Found.).

Therefore, it is critical that this Court provide guidance regarding this issue. Accordingly, for the reasons set forth below, ICSC and NAREIT respectfully submit that the Petition should be granted.

ARGUMENT

I. "Just Compensation" Must Include Diminutions In Value Caused by A Change In Access

A. The Just Compensation Clause Provides A Critical Protection of Property Rights

The Fifth Amendment to the United States Constitution mandates that condemnees must be paid "just compensation" for the taking of their property. The requirement that a condemnee be paid just compensation is a critical prerequisite to the use of the extraordinary power of eminent domain. James Madison, the author of the Fifth Amendment's Just Compensation Clause, created "strong safeguards for rights in general and for property rights in particular." William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 694 (1985). These "strong safeguards" include the Just Compensation Clause. *Id.* In *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), this Court

opined, "In any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government." *Id.* at 326. In analyzing the Just Compensation clause, this Court explained:

> The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right or power in the government, the last, the one in point here, being, "Nor shall private property be taken for public use without just compensation." The noun "compensation," standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective "just" had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective "just." There can, in view of the combination of those two words, be no doubt that

> the compensation must be a full and perfect equivalent for the property taken.

Id. at 326 (emphasis added).

Accordingly, any compensation that does not provide a "full and perfect equivalent for the property taken" violates the Just Compensation Clause and the safeguards of the Fifth Amendment.

B. A Condemnee "Must Be Made Whole" And "The Compensation Must Be A Full And Perfect Equivalent For The Property Taken"

This Court addressed the just compensation requirement in *Olson v. United States*, 292 U.S. 246 (1934) and held that in order to satisfy this Constitutional guarantee, a condemnee "must be made whole." *Id.* at 255. The Just Compensation Clause guarantees a condemnee will "be put in as good a position pecuniarily as if his property had not been taken." *Id. See also U.S. v. 564.54 Acres of Land, More or Less, Situated in Monroe and Pike Counties, Pa.*, 441 U.S. 506, 510-511 (1979) ("[i]n giving content to the just compensation requirement of the Fifth Amendment, this Court has sought to put the owner of condemned property in as good a position pecuniarily as if his property had not been taken.") (quoting *Olson* 292 U.S. at 255). "'Compensation,' as used in the constitutional provision as a limitation upon the power of eminent domain, implies full indemnity to the owner, that is, equivalent (usually monetary) for the loss sustained

by the owner for the land which has been taken or damaged." 4-12 Nichols on Eminent Domain § 12.01.

In *Monongahela Navigation Co.*, this Court held, "There can, in view of the combination of those two words [just compensation], be no doubt that the compensation must be a full and perfect equivalent for the property taken." 148 U.S. at 326. Indeed, "[t]he word 'just' is used evidently to intensify the meaning of the word 'compensation,' to convey the idea that the equivalent to be rendered for property taken shall be real, substantial, full, and ample, and that no legislature can diminish by one jot the rotund expression of the constitution." 4-12 Nichols on Eminent Domain § 12.01 (citations and quotations omitted).

This Court has also held that "[t]he guiding principle of just compensation is reimbursement to the owner for the property interest taken. . . . In many cases this principle can readily be served by the ascertainment of fair market value – 'what a willing buyer would pay in cash to a willing seller.'" *U. S. v. Virginia Elec. & Power Co.*, 365 U.S. 624 (1961) (citations omitted).

In *Almota Farmers Elevator & Warehouse Co. v. U. S.*, 409 U.S. 470 (1973) this Court summarized the practical application of these concepts as follows:

> The Fifth Amendment provides that private property shall not be taken for public use without "just compensation." And "just compensation" means the full monetary equivalent of the property taken. The owner is to be put in the

> same position monetarily as he would have occupied if his property had not been taken. To determine such monetary equivalence, the Court early established the concept of "market value": the owner is entitled to the fair market value of his property at the time of the taking. And this value is normally to be ascertained from "what a willing buyer would pay in cash to a willing seller."

Id. at 473-474 (citations omitted). *See also* 3-8 Nichols on Eminent Domain § 8.02 (The Supreme Court of the United States "has stated that the term 'just compensation' refers to the fair and reasonable market value of land or interest therein that is taken by the government, as measured at the time of the taking.")

C. Just Compensation Must Include "All Elements Of Value"

In determining the amount owed to a condemnee, "[j]ust compensation includes all elements of value that inhere in the property . . . ." *Olson*, 292 U.S. at 256 (1934). As one commentator has explained:

> All elements of value inherent in the property merit consideration in the valuation process. Every element which affects value and which would influence a prudent purchaser should be considered. No single element,

> standing alone, is decisive and, of course, illegal considerations should be ignored. No general rule can be inflexibly adhered to. Each case necessarily differs from all others insofar as its factual situation is concerned, and exceptional circumstances render imperative a fair degree of elasticity in application of the fundamental rule.

4-12 Nichols on Eminent Domain § 12.01 (footnotes omitted).

Similarly, in *Jacobs v. United States*, 290 U.S. 13 (1933), this Court held, the amount guaranteed to a condemnee is "just compensation, not inadequate compensation. The concept of just compensation is comprehensive and includes all elements . . . ." Id., at 17-18.

D. Just Compensation In Partial Takings Cases Must Include The Damage To The "Remainder"

The instant issue – whether just compensation should reflect the diminution in value due to a change in access – arises primarily in the context of "partial takings."[2] Partial takings involve the condemnation of part of a condemnee's property. In those cases, the damage to the portion of the property not taken – known as the "remainder" –

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[2] This issue not relevant in "total takings" – where the entire property is taken – because the entire property, including the use of access, is valued.

must be considered in determining just compensation.

This concept was explained in *United States v. Grizzard*, 219 U.S. 180 (1911) as follows:

> Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted.

Id. at 184.

The holding in *Grizzard* was based upon, *inter alia*, *Bauman v. Ross*, 167 U.S. 548 (1897), where this Court held:

> Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account.

Id. at 574.

Similarly, in *U.S. v. Miller*, 317 U.S. 369 (1943), this Court explained:

> If only a portion of a single tract is taken the owner's compensation for that taking includes any element of value arising out of the relation of the part taken to the entire tract. Such damage is often, though somewhat loosely, spoken of as severance damage.

Id. at 376.

Therefore, in partial taking cases, the damage to the remainder must be considered in determining just compensation.

E. Diminution In Value Due To A Change In Access Must Be Included In Just Compensation Payments

As shown above, the Just Compensation Clause requires, at a minimum, that a condemnee "must be made whole" and must "be put in as good a position pecuniarily as if his property had not been taken." *Olson*, 292 U.S. at 255. The compensation "must be a full and perfect equivalent for the property taken" and must include "all elements of value that inhere in the property . . . ." *Monongahela Navigation Co.*, 148 U.S. at 326, *Olson*, 292 U.S. at 256. In calculating the amount of just compensation, a condemnee is entitled to the fair

market value of its property at the time of the taking which is "to be ascertained from 'what a willing buyer would pay in cash to a willing seller.'" *Almota Farmers Elevator & Warehouse Co.*, 409 U.S. at 473-474. In partial takings cases, the compensation must include the damage to the "remainder." *Grizzard*, 219 U.S. at 184.

Each of these requirements is violated if the just compensation does not include damages to the remainder caused by a change of access. Once it is established in a de jure condemnation action – as was the case in the instant action – that a change of access caused a decrease in value to the remainder, the condemnee necessarily will not be "made whole" or "be put in as good a position pecuniarily as if his property had not been taken" unless it is compensated for that decrease. Compensation that does not reflect this decrease will not "be a full and perfect equivalent for the property taken."

In addition, it is beyond debate that access can be an "element of value" in many properties. The Appraisal Institute – the leading appraiser organization – instructs appraisers:

> An appraiser describes and analyzes all forms of access to and from the property and the neighborhood. . . . Planned changes in access should be verified with the appropriate authorities and considered in the appraisal.

The Appraisal of Real Estate (12th Ed.) at 207 (emphasis added). Accordingly, in cases where a change of access decreases the value of the

remainder, the condemnee must be paid for the decrease in that "element of value." *See Olson*, 292 U.S. at 256.

It is also beyond debate that "a willing buyer and seller" would consider the properties' access in determining the sale price. Accordingly, any decrease in value to the remainder caused by a change in access must be included in the just compensation payment. *See Almota Farmers Elevator & Warehouse Co.*, 409 U.S. at 473-474; *see also Grizzard*, 219 U.S. at 184.

Notwithstanding, the fundamental principles pronounced by this Court summarized above, most states violate the Just Compensation Clause because they restrict the ability of condemnees to obtain Access Compensation. *See*, e.g., *0.958 Acres, More or Les v. State of Alaska*, 762 P.2d 96 (Alaska 1988); *Brumer v. Los Angeles County Metro Trans. Auth.*, 36 Cal. App. 4th 1738 (Cal. Ct. App. 1995); *Dept. of Trans. v. Marilyn Hickey Ministries*, 159 P.3d 111 (Colo. 2007); *Palm Beach Cty. v. Tessler*, 538 So. 2d 846 (Fl. 1989); *Circle K General, Inc. v. Dept. of Trans.*, 396 S.E.2d 522 (Ga. Ct. App. 1990); *Merritt v. State of Idaho*, 742 P.2d 397 (Idaho 1986); *Leblanc v. State of Louisiana*, 626 So. 2d 1151 (La. 1993); *Osborne v. The City of Manhattan, Kansas*, 765 P.2d 1100 (Kan. 1988); *Com. v. Comer*, 824 S.W.2d 881 (Ky. Ct. App. 1991); *Malone v. Com.*, 389 N.E.2d 975 (Mass. 1979); *City of Gulfport v. Anderson*, 554 So. 2d 873 (Miss. 1989); *Orcutt v. Town of Richmond*, 517 A.2d 1160 (N.H. 1986); *Dale Properties, LLC v. State*, 638 N.W.2d 763 (Minn. 2002); *State v. Linnecke*, 468 P.2d 8 (Nev. 1970); *State v. Shanahan*, 389 A.2d 937 (N.H. 1978); *State v. National Amusements, Inc.*, 581 A.2d 1353 (N.J.

Super. Ct. App. Div. 1990); *Dept. of Trans. v. Harkey*, 301 S.E.2d 64 (N.C. 1983); *Com. v. Guyette*, 520 A.2d 548 (Pa. Commw. Ct. 1987); *Bruzzese v. Wood*, 674 A.2d 390 (R.I. 1996); *City of Grapevine v. Grapevine Pool Road Joint Venture*, 804 S.W.2d 675 (Tex. App. 1991); *Union Elevator & Warehouse Co., Inc. v. State*, 980 P.2d 779 (Wash. Ct. App. 1999).

In the instant case, the Supreme Court of Indiana stated that the jury award was "sustainable only if [the Condemnee's] impaired access is compensable." *See* Pet. A-10. As shown above, an application of this Court's holdings leads to the inevitable conclusion that there is no question that it should have been compensable. The condemnee demonstrated – and the jury found – that the change in the access decreased the value of the remainder. Therefore, unless the condemnee was permitted to obtain compensation reflecting that decrease, it would not "be made whole," "be put in as good a position pecuniarily as if his property had not been taken" or receive the "full and perfect equivalent for the property taken." The decrease in value due to the change in access was clearly an "element of value that inhere[d] in the property . . ." and unless it was compensable, the compensation amount did not include the amount "a willing buyer would pay in cash to a willing seller." *See Olson*, 292 U.S. at 255, 256, *Monongahela Navigation Co.*, 148 U.S. at 326, *Almota Farmers Elevator & Warehouse Co.*, 409 U.S. at 473-474, *Grizzard*, 219 U.S. at 184.

The results caused by states that do not permit Access Compensation are unjust and clearly contrary to the intent of the Just Compensation Clause and this Court's holdings. First, there should

be no restrictions on the ability of a condemnee to obtain Access Damages if they are proven.

Further, these improper rules have led to disparate results. Commentators agree that these rulings have created serious problems:

> It must be understood that because courts from different jurisdictions agree in general terms on a reasonableness test for compensable impairment of access, it does not necessarily follow that they will reach the same result under similar factual circumstances. The nature of the access right is subject to different interpretations in different jurisdictions, and naturally this will affect the question of the right of the abutting landowner to recover damages for limitation of access resulting from the conversion of a conventional highway into a limited-access highway. For example, in *People v Ricciardi* (1943) 23 Cal 2d 390, 144 P2d 799, infra, the court said that abutting landowners possessed "the right of direct access to the through traffic highway," while at the other extreme, the court in *State ex rel. State Highway Com. v Danfelser* (1963) 72 NM 361, 384 P2d 241, cert den 375 US 969, 11 L Ed 416, 84 S Ct 487, infra, rejected the view that the abutting landowner has anything more than a right of reasonable access

> to the general highway system. Yet in both of these cases the courts recognized the right to recover for substantial or unreasonable limitation of access. And in *Stefan Auto Body v State Highway Com.* (1963) 21 Wis 2d 363, 124 NW2d 319, infra, which also recognized a reasonableness test for compensable impairment of access, the court applied a more stringent definition of the right of access to federal interstate highways than it said was applicable to other limited-access highways.

42 A.L.R.3d 13.

One commentator explained:

> Virtually all jurisdictions state the rule that if governmental activity creates a "material and substantial impairment" of access, then compensation may be awarded. The owner is said to be entitled to "reasonable" or "free and convenient" or "suitable" access. Nevertheless, courts differ on what they consider "reasonable," and their consideration is essentially fact-based.

8A-G16 Nichols on Eminent Domain § G16.03.

Another commentator states:

> Virtually all jurisdiction state the rule that if governmental activity creates a "material and substantial impairment" of access, compensation will be allowed. The property owner is said to be entitled to "reasonable" and "free and convenient" or "suitable" access. Unfortunately, the apparent unanimity on this score does not provide a meaningful guidepost to the issue of compensability: Different courts take different views of what is reasonable or suitable or the like.
>
> The reasonableness test, however, while ostensibly close to being a true analytical tool, is not. It permits the court, if so inclined, to balance the degrees of harm that we will not expect individuals to suffer for the benefit of the general public. It therefore performs one valid function: It allows courts ad hoc to do rough justice. It fails, however, to permit enough predictability of result to qualify as a true basis of analysis. Even within the same jurisdiction, there may be inconsistencies and gray areas. From state to state, inconsistency is the norm.

McKirdy, *Compensation for Impairment of Rights of Access, 1988 Institute on Planning, Zoning and Eminent Domain* § 13.03 (Sw. Legal Found.) (emphasis added).

To the extent this Court has considered similar issues, it has held that just compensation must include Access Compensation. For example, in *U.S. v. Welch*, 217 U.S. 333 (1910) this Court held that where access was taken by the Federal Government, the damage to the remainder for that change must be included in the just compensation award. *Id.*

Similarly, in *Grizzard*, this Court held that the taking of an "easement of access" was a compensable element of just compensation. In that case, the United States government flooded a farm. The owners of the farm owned an "easement of access" over a public road running across the flooded land which was also destroyed by the same flood. That public road was the access point for the farm. The United States argued that the loss of that easement should not have been considered in determining the amount of just compensation owed to the condemnee. As the Court explained, "[b]oth the petition and the finding show that access to the public road has been cut off by the intervention of flooded land actually taken." *Id.* at 185. The Court held that the impact of the loss of such access must be considered in determining the proper amount of just compensation.

It is clear that this Court must provide direction regarding this recurring problem. Courts are not paying true just compensation and, at best, "[f]rom state to state, inconsistency is the norm." This is causing great harm to property owners and must be rectified.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

Respectfully submitted,

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